No. 89-7743

In The

Supreme Court of the United States

October Term 1990

THADDEUS DONALD EDMONSON

Petitioner,

versus

LEESVILLE CONCRETE COMPANY, INC.

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF BY DEFENSE RESEARCH INSTITUTE IN SUPPORT OF RESPONDENT

JEANMARIE LOCOCO
JOHN J. WEIGEL
JONES, WALKER, WAECHTER,
POITEVENT, CARRERE & DENEGRE
201 St. Charles Ave, 48th Fl.
New Orleans, LA 70170
(504) 582-8000

Attorneys for Amicus Curiae
Defense Research Institute

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

STATEMENT OF INTEREST OF AMICUS CURIAE

The Defense Research Institute ("DRI") is the largest national organization of lawyers specializing in the defense of civil litigation. DRI has over 17,000 individual lawyer members and is connected to most defense law firms in the United States through its relation to the International Association of Defense Counsel, the Federation of Insurance and Corporate Counsel, the Association of Defense Trial Attorneys and sixty state and local defense lawyer organizations. DRI's members represent clients in countless tort-related cases in every jurisdiction. As trial advocates, they frequently face the task of jury selection. DRI's members have viewed their participation in the jury selection process by use of a reasonable number of peremptory challenges as a legitimate tool in assuring a fair hearing of the defendant's case. DRI and its members share a common interest in the fairness and neutrality of the jury system, as well as its efficiency.

SUMMARY OF ARGUMENT

The Defense Research Institute ("DRI") submits this brief as Amicus Curiae to urge this Honorable Court to affirm the decision of the U.S. Court of Appeals, Fifth Circuit, sitting *en banc* (reported at 895 F.2d 218). The court below correctly held that the decision of this Court in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986) does not apply to the exercise of peremptory challenges by a private attorney representing a private client in a civil case. DRI respectfully maintains that this holding is correct in that (1) the decision is

consistent with the nature, purpose and history of the peremptory challenge in jury trial cases, (2) government action is absent when an attorney representing a private party in civil litigation between private parties exercises peremptory challenges, and (3) the rationale for the *Batson* holding is absent in civil litigation between private parties; specifically, (a) the role of the private attorney is distinct from that of the criminal prosecutor, (b) there is no danger of the private attorney effecting the deliberate and systematic exclusion of any group of citizens from serving as jurors, and (c) there is no "right" conferred by law which requires application of the *Batson* holding to this case.

ARGUMENT

I. THE DECISION OF THE COURT BELOW IS CONSISTENT WITH THE NATURE, PURPOSE AND HISTORY OF THE PEREMPTORY CHALLENGE IN JURY TRIAL CASES.

The peremptory challenge, as part of the jury selection process, "has very old credentials." *Swain v. Alabama*, 380 U.S. 202, 212, 85 S. Ct. 824, 831, 13 L.Ed.2d 421 (1965). Such challenges are rooted in very early English common law, and the "right of challenge was a privilege highly esteemed, and anxiously guarded . . . " *Id.* at 212-214 and n.13 citing *United States v. Johns*, 4 U.S. 412, 1 L.Ed. 888 (Cir. Ct. Pa. 1806). Much has been written on the historical importance of the peremptory challenge in the jury

trial system.[1] This Court has given recognition and deference to the long history and tradition of the peremptory challenge as a part of trial by jury. *Swain*, 380 U.S. at 212-220, 85 S. Ct. at 831-836. The Court has specifically acknowledged that peremptory challenges "traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury." *Batson v. Kentucky*, 476 U.S. 79, 91, 106 S. Ct. 1712, 1720, 90 L.Ed.2d 69 (1986), citing *Swain*, 380 U.S. at 219.

Since their introduction into the jury trial system, it has been axiomatic that peremptory challenges are not subject to judicial inquiry. By its nature, the challenge is "one exercised without a reason stated, without inquiry and without being subject to the court's control." *Swain*, 380 U.S. at 220, 85 S. Ct. 836. It has been suggested that there are four basic rationales for the peremptory challenge, specifically, (1) it facilitates the removal of those potential jurors whom a party may suspect to be biased, but who have not been shown to have any bias that would rise to a challenge for cause, (2) it eliminates jurors who may have been antagonized during voir dire by the attorneys' attempts to ascertain actual bias, (3) it avoids "trafficking in the core of truth in most common stereotypes," and (4) it plays a role in legitimizing the jury trial process by demonstrating that the jury is that of the

---

[1] *See, e.g.*, Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels*, 145-51 (1977); Mintz, *Batson v. Kentucky: A Half Step in the Right Direction (Racial Discrimination and Peremptory Challenges Under the Heavier Confines of Equal Protection)*, 72 Cornell L. Rev. 1026, 1039-41 (1987).

litigants' choice.[2] As this Court described the purpose of the peremptory challenge:

> The function of the challenge is not only to eliminate extremities of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide it on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that "to perform its high function in the best way 'justice must satisfy the appearance of justice.' "

Swain, 380 U.S. at 219, 85 S. Ct. at 835, quoting, in part, *In Re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L.Ed. 942 (1955). The Court has also: acknowledged that the challenge is "deemed an effective means of obtaining more impartial and better qualified jurors"; alluded to the "long and widely held belief that peremptory challenge is a necessary part of trial by jury" and "one of the most important of the rights secured to the accused; and further, noted its usefulness in "removing the fear of incurring a juror's hostility through examination and challenge for cause." *Id.* at 218-220. The *Batson* majority expressly rejected a suggestion in a concurring opinion "that this historic practice, which long has served the selection of an impartial jury, should be abolished." 476 U.S. at 99 n.22. More recently, in *Holland v. Illinois*, ___ U.S. ___, 110 S. Ct. 803, 808, 107 L.Ed.2d 905 (1990), this

---

[2] Hopper, *Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?* 74 Va. L. Rev. 811 at n.2 (1988) quoting in part, Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 Stan. L. Rev. 545, 553 (1975).

Court reiterated the value of peremptory challenges, stating:

> One could plausibly argue (though we have said the contrary [citation omitted]) that the requirement of an "impartial jury" impliedly *compels* peremptory challenges, but in no way could it be interpreted directly or indirectly to prohibit them. (Emphasis in original.)

This is, by no means, to attribute a constitutional dimension to the right to exercise a peremptory challenge: "There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges . . . " *Stilson v. United States*, 250 U.S. 583, 586, 40 S. Ct. 28, 30, 63 L.Ed. 1154 (1919). Nonetheless, Congress has seen fit to provide, by statute, that "[i]n civil cases, each party *shall be entitled* to three peremptory challenges." 28 U.S.C. § 1870 (emphasis supplied). Absent a constitutional violation in the operation of that statute, specifically, the use of the challenge by a governmental actor in a manner which violates the guarantee of equal protection under the law, the peremptory challenge is a litigant's right, afforded by Congress in a jury trial. Absent such a violation, the courts are not empowered to mutate the peremptory challenge into "a strange procedural creature . . . a challenge for semi-cause." *Edmonson v. Leesville Concrete Co., Inc.*, 860 F.2d 1308, 1317 (1988) (Panel opinion, Gee, J., dissenting).

II. GOVERNMENT ACTION IS ABSENT WHEN AN ATTORNEY REPRESENTING A PRIVATE PARTY IN CIVIL LITIGATION BETWEEN PRIVATE PARTIES EXERCISES PEREMPTORY CHALLENGES.

Under the Fifth and Fourteenth Amendments to the Constitution, the federal government may not constitutionally deny any person the equal protection of the law. *Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693, 98 L.Ed. 884 (1954). In order to invoke this constitutional guarantee, conduct which can be "fairly characterized" as "state" (government) action must be present. *Lugar v. Edmonson Oil Co., Inc.*, 457 U.S. 922, 924, 102 S. Ct. 2744, 2747, 73 L.Ed.2d 432 (1982). It is well settled that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S. Ct. 836, 842, 92 L.Ed. 1161 (1948). DRI submits that government action is absent when an attorney representing a private party in civil litigation between private parties exercises peremptory challenges.

Petitioner contends that, in the instant case, state action is not required "in any classic sense," but fails to provide explanation or authority for this proposition. Government action as a prerequisite to an application of the equal protection guarantee is so interwoven in the fabric of this Court's decisions as to be irrefutable.[3] It is a sensible limitation which prevents private parties from

---

[3] *See, e.g., Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S. Ct. 836, 842, 92 L.Ed. 1161 (1948), wherein Chief Justice Vinson refers to this requirement as one "embedded in our constitutional law."

facing "constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." *Lugar*, 457 U.S, at 937, 102 S. Ct. at 2754.

Petitioner further contends that the trial judge is a government actor based upon his supervisory authority in connection with the trial proceedings. DRI submits that the trial judge's role in connection with private counsel's exercise of peremptory challenges in a civil case falls far short of that required to conclude that government action has been taken. In considering the nature of conduct which can be fairly attributable to the state, this Court's decisions have consistently focused upon the *decision* to discriminate as one ascribable to the government. *See, e.g., Lugar*, 457 U.S. at 938, 102 S. Ct. at 2754; *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-177, 92 S. Ct. 1965, 1973, 32 L.Ed.2d 627 (1972). In *Blum v. Yaretsky*, 457 U.S. 991, 1004-1005, 102 S. Ct. 2777, 2786, 73 L.Ed.2d 534 (1982), the Court explicitly pronounced considerations which provide particular guidance in the instant case:

> . . . [A] State normally can be held responsible for a *private decision* only when it has exercised *coercive power* or has provided such *significant encouragement* either overt or covert, that the choice *must in law be deemed to be that of the State* [citation omitted]. Mere *approval of* or *acquiescence in* the initiatives of a private party is *not sufficient* to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment [citation omitted].

(Emphasis supplied.) The foregoing principles go to the very heart of the matter presently before the Court. Indeed, the above-quoted words could have been written

specifically for the instant case. It is clear that the trial judge's actions in excusing a juror following counsel's exercise of a peremptory challenge amounts, *at most*, to acquiescence in *counsel's* decision. However, the judge's actions are, more accurately, an *acknowledgement* of counsel's right to exercise those challenges as he deems fit.

Petitioner's reliance on *Shelley*[4] and *Burton*[5] is misplaced. In *Shelley*, the Court held that judicial enforcement of private racial covenants constituted state action under the Fourteenth Amendment. The holding was based upon the *purposeful* exertion of state power, exercised by the judiciary, to deny individuals the equal protection of the laws. The holding is specifically focused upon a governmental *decision* resulting in the denial of substantive constitutional rights, i.e., the enjoyment of property, in a discriminatory fashion:

> States have made available the full *coercive power* of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and in which the guarantors are willing to sell.

334 U.S. at 19, 68 S. Ct. at 845 (emphasis supplied). By contrast, in connection with a private attorney's exercise of peremptory challenges on behalf of his private client, the Court is not called upon to exercise its discretion, to make any decision, or to act as an agent for enforcement

---

[4] 334 U.S. 1, 68 S. Ct. 836.

[5] *Burton v. Wilmington Parking Authority*, 365 U.S. 706, 81 S. Ct. 856, 6 L.Ed.2d 45 (1961).

of a private decision which would deprive any person of his constitutional rights. The Court does not *act* at all in these instances, much less act purposefully, but merely takes note of the exercise of the private litigant's procedural right. To conclude otherwise would necessarily imply that a party is *entitled* substantively to a jury containing members of his own race, or to a jury with proportional representation by members of his race. It is well settled that he is not.[6]

The point of the *Shelley* decision was brought to the forefront in *Reitman v. Mulkey*, 387 U.S. 369, 87 S. Ct. 1627, 18 L.Ed.2d 830 (1967). In *Reitman*, the Court struck down as unconstitutional, a state statute which authorized "racial discrimination in the housing market." 387 U.S. at 381, 87 S. Ct. at 1637. As such, *Reitman* is the legislative-participation equivalent of *Shelley*'s holding with regard to the judiciary's *purposeful* participation in depriving individuals of their substantive constitutional right to enjoyment of property.

These principles were carried forward in *Lugar*, which also focused upon purposeful discrimination by the government. Specifically, the government had "created a system whereby state officials [would] attach property on the *ex parte* application of one party to a private dispute." 457 U.S. at 942, 102 S. Ct. at 2756. The holding in *Lugar* was based upon the *joint action* of a state officer

---

[6] *Swain*, 380 U.S. at 203, 85 S. Ct. at 826; *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S. Ct. 692, 701, 42 L.Ed.2d 690 (1975); *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 1070 n.1, 103 L.Ed.2d 334 (1989); *Holland v. Illinois*, ___ U.S. ___, 110 S. Ct. 803, 806, 107 L.Ed.2d 905 (1990).

and a creditor in securing property with the result that the decision to discriminate could be ascribed to the government.[7]

The interpretation of *Shelley* and its progeny as urged by the petitioner would confer insupportable expansiveness to these decisions and would, in practice, place constitutional restraints on any and all private choices. *Shelley* does not mandate a result different from that reached by the court below. At most, the cases discussed above show only that governmental action *may* consist of judiciary involvement under some circumstances.

Likewise, *Burton* does not warrant a different result. *Burton* involved the refusal of the operator of a restaurant to serve a patron based upon the patron's race. The Court found state action to be present in that the restaurant was on property leased to the private party by an agency of the state. While *Burton* may appear to extend the scope of governmental responsibility, the opinion is self-limiting:

> Because readily applicable formulae may not be fashioned, the conclusions drawn from the facts and circumstances of this record are *by no means declared as universal truths* on the basis of which every state leasing agreement is to be

[7] *See also Tulsa Professional Collection Services, Inc. v. Polk*, 485 U.S. 478, 108 S. Ct. 1340, 99 L.Ed.2d 565 (1988) which is the procedural due process equivalent of *Shelley*'s equal protection holding. Specifically, the case addressed the requirement of notification of state action affecting property rights of the individual. The Court determined that "state action" was present, because the probate court was "intimately involved throughout" the process of a probate statute which could not be executed without this involvement.

tested. Owing to the very "largeness" of government, a multitude of relationships might appear to some to fall within the Amendment's embrace, but that, it must be remembered, *can be determined only in the framework of the peculiar facts or circumstances present*. Therefore respondents' prophecy of nigh universal application of a constitutional precept so peculiarly dependent for its invocation upon appropriate facts fails to take into account "differences in circumstances [which] beget appropriate differences in law." [citation omitted] *Specifically defining the limits of our inquiry*, what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lease as certainly as though they were binding covenants written into the agreement itself.

365 U.S. at 725-726, 81 S. Ct. at 862, 6 L.Ed.2d 45 (1961) (emphasis supplied).

Furthermore, it has been suggested in commentary that the precedential value of *Burton* has dwindled.[8] Indeed, the Supreme Court refused to apply the *Burton* rationale in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S. Ct. 1965, 32 L.Ed.2d 627 (1972). *Moose Lodge*, like *Burton*, involved refusal of service by a private party on the basis of race. The appellee was a negro guest of a member of a private club and was refused service at the club's dining

[8] *See* L. Tribe, *American Constitutional Law* (2d ed. 1988) at 1701 n.13, discussing *San Francisco Arts & Athletic, Inc. v. United States Olympic Committee*, 483 U.S. 522, 107 S. Ct. 2971, 97 L.Ed.2d 427 (1987).

room and bar because of his race. He contended that the discrimination was state action in violation of the Fourteenth Amendment in that the state liquor board had issued a private club liquor license to the club. The Court concluded that the club's actions did not present a violation of the Fourteenth Amendment, distinguishing *Burton* on the grounds that, in *Burton*, "profits earned by discrimination not only contribute[d] to, but also were indispensable elements in the financial success of a governmental agency." 407 U.S. at 174-75, 92 S. Ct. at 1972, quoting *Burton*, 365 U.S. at 723-724, 81 S. Ct. at 861. The Court noted that "[h]ere there is nothing approaching the symbiotic relationship" involved in *Burton*. 407 U.S. at 175, 92 S. Ct. at 1972. The *Moose Lodge* opinion adopts *Reitman*'s instruction that "where the impetus for the discrimination is private, the state must have 'significantly involved itself with invidious discriminations.' " 407 U.S. at 173, 92 S. Ct. at 1971, quoting *Reitman*, 387 U.S. at 380, 87 S. Ct. at 1634. The Court concluded:

> However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise.

407 U.S. at 176-177, 92 S. Ct. at 1973.

Applying the rationale of *Moose Lodge* to the instant case, it would be appropriate to refer to Judge Gee's dissenting comments, in the panel opinion, concerning the role of the trial judge in connection with the exercise of peremptory challenges by a private attorney representing a private client.

> It is difficult to conceive of more minimal involvement than this – one which requires the exercise of no judgment or discretion, one which consists of nothing more than permitting the excused to depart.

See Edmonson, 860 F.2d at 1316. Under the circumstances of this case, there is undeniably no "symbiotic relationship" between the trial judge and private counsel, nor is there any rational basis for attributing to the trial judge significant involvement in, or encouragement of, private counsel's decision concerning who will be the subject of his peremptory challenges. In sum, *Burton* does not provide authority for petitioner's position.

Petitioner also suggests that the attorney exercising the peremptory challenges, under the supervision of the trial judge, is a "state actor." However, such a suggestion flies in the face of this Court's holding that a public defender is not a state actor in performing a lawyer's traditional function as counsel to a defendant in a state criminal proceeding. *Polk County v. Dodson*, 454 U.S. 312, 102 S. Ct. 445, 70 L.Ed.2d 509 (1981). To recognize that a public defender employed by the government is not a governmental actor while performing the traditional functions of a lawyer, and yet to attribute governmental action to a privately-retained counsel performing those functions, is to create an irreconcilable inconsistency. Moreover, to attribute state action to decisions made by the attorney concerning peremptory challenges based solely upon the judge's presence in the courtroom to supervise the proceedings, is to create, not merely a legal fiction, but an untenable fantasy. If this were the result, it is apparent that any and all actions of an attorney during

judicial proceedings could be the subject of a constitutional attack or a suit for damages under 42 U.S.C. § 1983. The result would be to totally undermine the roll of the attorney in any judicial proceeding. More importantly, this would be to apply constitutional principles far beyond their defined scope.

III. THE RATIONALE FOR THE *BATSON* HOLDING IS ABSENT IN CIVIL LITIGATION BETWEEN PRIVATE PARTIES.

Petitioner argues that the holding of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986) should be extended to encompass civil litigation between private parties. However, the underlying rationale of the *Batson* decision is absent in such cases.

The *Batson* holding was built from the foundation of cases in which the Court has repeatedly held that discrimination in the procedures used to select a jury venire is unconstitutional. *See Batson*, 476 U.S. at 84 n.3, 106 S. Ct. at 1716 n.3. For over one hundred years, the Court has guarded the principle that it is unconstitutional for the state to deliberately, intentionally, and systematically exclude any class of persons from the jury venire.[9] The systematic exclusion of any group from the jury venire violates the litigant's entitlement to a venire designed to

---

[9] *See, e.g., Avery v. State of Georgia*, 345 U.S. 559, 73 S. Ct. 891, 91 L.Ed. 1244 (1953) (exclusion based upon race); *Ballard v. United States*, 329 U.S. 187, 67 S. Ct. 261, 91 L.Ed. 181 (1946) (exclusion based upon sex); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 66 S. Ct. 984, 90 L.Ed. 1181 (1946) (exclusion of daily wage earners).

represent a fair cross section of the community. *Holland v. Illinois*, ___ U.S. ___, 110 S. Ct. 803, 805 (1990). The *Batson* decision rested upon the settled principle that "the state may not draw its jury list pursuant to neutral procedures but then resort to discrimination at 'other stages in the selection process.' " *Batson*, 476 U.S. at 88, 106 S. Ct. at 1718, quoting *Avery v. Georgia*, 345 U.S. 559, 562, 73 S. Ct. 891, 893, 97 L.Ed. 1244 (1953). The Court made it clear that the deliberate and systematic exclusion of any group of citizens from serving as jurors constituted "a primary example of the evil the Fourteenth Amendment was designed to cure." *Batson*, 476 U.S. at 85, 106 S. Ct. at 1716. The identified "evil" is "the false assumption that members of [a particular] race as a group are not qualified to serve as jurors." *Batson*, 476 U.S. at 86, 106 S. Ct. at 1717. Furthermore, in criminal prosecutions, it is unconstitutional for the state to exercise peremptory challenges "to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black." *Batson*, 476 U.S. at 97, 106 S. Ct. at 1723. Thus, the Court delineated a procedure designed to effectuate these principles. DRI acknowledges the policies which prompted the Court to place these constraints upon the criminal prosecutor. *His role is to enforce the purpose of the state and to assure that justice is done.* As the *Edmonson* majority observed:

> It is, we think, a sound policy that requires the state to conform to stricter standards and appearances in dealing with its citizens than are demanded of those citizens in their dealings with each other.

Edmonson, 895 F.2d at 225.

The role of the private attorney representing a private citizen in a civil lawsuit is distinct from that of the criminal prosecutor. He is bound by oath to represent his client zealously within the bounds of the law. In his role as advocate, his purpose is to achieve a resolution most favorable to his client. In the jury selection process, he ideally hopes to select individuals with a predisposition to viewing the evidence in a light most favorable to his client. He exercises his peremptory challenges with an interest in excluding any member of the venire who, to his mind, may have a predisposition to viewing the evidence in a light more favorable to the opposing party than to his client. Presumably, petitioner's attorney did exactly this when he utilized his peremptory challenges to strike three white members of the jury venire. However, petitioner's entire thesis is premised upon an untenable assumption: that exercising peremptory challenges in a civil lawsuit allows "those to discriminate who are of a mind to discriminate." *Avery*, 345 U.S. at 562, 73 S. Ct. at 892. It is inconceivable that an attorney in a civil action, even if he has a mind to discriminate, would exercise his peremptory challenges in any manner other than to achieve a panel of persons whom he believes will view the evidence in the light most favorable to his client.

Moreover, the "evil" which *Batson* was designed to eliminate, namely, the *intentional and systematic exclusion* of any particular group from having the opportunity to be selected for jury service, is simply not present in civil cases. While a government prosecutor may have the power to effectuate such an evil, it is inconceivable that any private attorney representing private parties has the

means to wield such power as to accomplish the systematic exclusion of any group from jury service.

In urging this Court to apply the *Batson* holding to civil cases, petitioner has cast a wide net over the various cases in which this Court has affirmed and reaffirmed its commitment to eradicate discrimination violative of constitutional rights. Obviously, in order for the Court to accept petitioner's position, it would be necessary to find that some right of the petitioner protected by law has been violated. Petitioner has invoked the Fourteenth Amendment. However, in the final analysis, petitioner contends that the right in question is the "fair possibility for obtaining a representative cross section of the community" on the jury panel.[10] The "fair cross section" requirement, however, applies only to the jury venire. *Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893, 26 L.Ed.2d 446 (1970). As the Court has instructed:

> The fair-cross-section venire requirement assures . . . that in the process of selecting the petit jury the prosecution and defense will compete on an equal basis.
>
> But to say that the Sixth Amendment deprives the State of the ability to "stack the deck" in its

---

[10] Petitioner has also invoked 42 U.S.C. § 1981, relying on the cases of *Runyon v. McCrary*, 427 U.S. 160, 96 S. Ct. 2586, 49 L.Ed.2d 415 (1976) and *Patterson v. McLean Credit Union*, ___ U.S. ___, 109 S. Ct. 2363, 105 L.Ed.2d 132 (1989). Both of these cases address deprivation of the right to enter contracts and neither has any particular bearing upon the issues before this Court. The issue of whether the jury selection process has been conducted in a manner which violates federal law has consistently been decided by this Court under the Sixth and Fourteenth Amendments.

> favor is not to say that each side may not, once a fair hand is dealt, use peremptory challenges to eliminate prospective jurors belonging to groups it believes would unduly favor the other side.

Holland v. Illinois, ___ U.S. ___, 110 S. Ct. 803, 807, 107 L.Ed.2d 905 (1990). Thus, returning to the initial inquiry, what is the protected right which, according to the petitioner, has been violated? Clearly, a party is not entitled substantively to a jury containing members of his own race, *Swain*, 380 U.S. at 203, 85 S. Ct. at 826, nor is a party entitled to a jury which "mirror[s] the community as reflect[s] the various distinctive groups in the population," *Holland*, 110 S. Ct. at 808-809.

Petitioner's arguments then, must stand or fall under the Fourteenth Amendment and the holding of *Batson*. Hence, petitioner's arguments fail. The Court in *Batson* made it clear that "the component of the jury selection process at issue" was "the *State's* privilege to strike individual jurors through peremptory challenges," a privilege subject to the Fourteenth Amendment which precludes the intentional and systematic exclusion of a cognizable group. *Batson*, 476 U.S. at 89, 106 S. Ct. at 1719 (emphasis supplied). On a more elementary level, it simply cannot be said that petitioner's right to equal protection under the law has been violated, since each party had equal prerogative and opportunity to peremptorily strike whomever they chose from the jury venire. As this Court has stated (albeit in connection a Sixth Amendment issue):

> [The fair-cross-section venire requirement] has never included the notion that, in the process of drawing the jury, that initial representativeness cannot be diminished by allowing

> both the accused and the State to eliminate persons thought to be inclined against their interest – which is precisely how the traditional peremptory-challenge system operates.

Holland, 110 S. Ct. at 807. In *Holland*, the Court rejected the notion that the fair-cross-section requirement was violated by use of peremptory challenges to strike perspective jurors of a particular race, and petitioner has failed to show how he has been denied the equal protection of the law. Specifically, the petitioner has identified the right of which he has allegedly been deprived as his "fair possibility for obtaining a representative cross-section of the community." Neither the facts, nor the law, support the proposition that petitioner's Fourteenth Amendment rights have been violated. He has had his day in court. Indeed, there is no suggestion that the jury in this case was not impartial or that he did not have a fair trial. In the final analysis, petitioner has simply "roll[ed] out the ultimate weapon, the accusation of insensitivity to racial discrimination – which will lose its intimidating effect if it continues to be fired so randomly." *Holland*, 110 S. Ct. at 810.

At this juncture, it is appropriate to ask: How does the exercise of peremptory challenges in a civil case give rise to the possibility of "discrimination"? By way of example, an attorney representing a woman claiming damages resulting from sexual harassment in the work place might utilize all peremptory challenges to strike male veniremen, particularly if they are employed in managerial capacities. Plaintiff in such a case might well believe that the stricken veniremen have as much chance of understanding her plight as they would empathizing

with childbirth. On the other hand, the defendant in such a case might utilize all peremptory challenges to strike women from the panel on the belief that, since most (if not all) women have at some time or another experienced some form of sexual discrimination, women would be more likely to view the plaintiff's case in a favorable light. Undeniably, the Fourteenth Amendment protects persons from denial of equal protection on the basis of sex. But, in the example given above, can it be said that either plaintiff's or defendant's constitutional rights have been violated or that either party has engaged in "discrimination"? DRI submits that the answer to this question is "no." Rather, each party has had an opportunity to participate in the jury selection process in a manner which assures each of them the greatest chance of having their case heard by a fair and impartial jury.

Likewise, in the example set forth by the *Edmonson* majority:

> . . . [O]ne may well imagine that counsel defending a well-known member of the Ku Klux Klan in an action for, say, breach of contract by a white plaintiff might strike any black veniremen whom he had been able to convince the judge to excuse for cause, *not because of any notion of ethnic inferiority*, but rather on the prudential ground of probable hostility ineradicable despite the subject's best efforts. Such an action does not demean the stricken subject; it merely recognizes a probable fact of life.

895 F.2d at 224 (emphasis supplied).

Neither example implies violation of a constitutional right. Rather, in each example, both sides have been allowed "to eliminate persons thought to be inclined

against their interests – which is precisely how the traditional peremptory-challenge system operates." *Holland*, 110 S. Ct. at 807. More importantly, in each instance, the private parties neither intend, nor have the power, to execute a systematic exclusion of a class of individuals from jury service on the basis of race or sex.

Finally, it is necessary to posit the full ramifications of the proposition that the privilege of private parties to use peremptory challenges is subject to the equal protection clause of the Fourteenth Amendment. Put simply, if this Court were to accept petitioner's position, then virtually any party who belongs to a "cognizable class," and who is dissatisfied with the considered judgment of a jury, will have a ready basis for seeking a new trial. In that event, the courts will, no doubt, be required to sift through such questions as: Does the rule apply where the representative of a corporate defendant is white and plaintiff utilizes his peremptory challenges to strike white veniremen? Under what circumstances would the rule apply to peremptory challenges used to strike persons of a certain sex? Or sexual preference? Or ethnic group? Or religious affiliation? It is submitted that in civil cases, where neither life nor liberty are at stake, and where the state is not a party, the exercise of peremptory challenges need not be hampered by consideration of these questions.

CONCLUSION

In conclusion, DRI respectfully submits that this Honorable Court should affirm the *en banc* decision of the court below. The use of the peremptory challenge in civil litigation is a privilege bestowed by statute. The exercise of peremptory challenges in civil litigation between private parties does not imply any government action which would promote such conduct to constitutional dimensions. Moreover, the result urged by the petitioner has no basis in this Court's decisions, which were meant to address and correct the purposeful and systematic exclusion of persons from jury service on account of race or other classifications. DRI and its members view the peremptory challenge as a valuable and useful tool in assuring fairness in the jury selection process, and it is a privilege which should remain intact without unwarranted and unjustified dilution.

Respectfully submitted,

JEANMARIE LOCOCO
JOHN J. WEIGEL
JONES, WALKER, WAECHTER,
POITEVENT, CARRERE & DENEGRE
201 St. Charles Ave., 48th Fl.
New Orleans, LA 70170
(504) 582-8000
Attorneys for Amicus Curiae
Defense Research Institute